NARAYASAMY v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) December 29, 1967]
[Penang — Criminal Appeal No. 54 of 1967]

Criminal Procedure — Sentence — Inadequacy of — Power of magistrate — Courts Ordinance, 1948, s. 87(2).

The appellant was charged for theft under section 379 of the Penal Code. He pleaded guilty, and was sentenced to twelve month's imprisonment to be followed by one year's police supervision. The appellant had had twenty-two previous convictions. The magistrate, in his grounds of judgment, expressed the view that considering the accused's previous convictions, the appropriate sentence should have been one of three years' imprisonment, but that the decision in *Hitam* v. *Public Prosecutor* [1] had precluded him from exercising his powers under section 87(2) of the Courts Ordinance, 1948, and imposing the appropriate sentence. On appeal against the conviction and sentence,

Held, dismissing the appeal: a magistrate has power under section 87(2) of the Courts Ordinance, 1948 to impose a sentence in excess of that prescribed by section 87(1), where in view of the circumstances of the case, the sentence prescribed by that section is considered to be inadequate.

The sentence of twelve months' imprisonment was accordingly substituted to one of three years' imprisonment.

Case referred to:—

(1) *Hitam* v. *Public Prosecutor* [1963] M.L.J. 224.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Haji Suhaimi bin Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J. (delivering oral judgment): In this case the accused was charged under section 379 of the Penal Code with theft of a bicycle. He pleaded guilty to the charge and the learned magistrate sentenced him to 12 months' imprisonment to be followed by one year's police supervision. The accused appealed against conviction and sentence.

The magistrate mis-read the judgment of Hashim J. in *Hitam* v. *Public Prosecutor.* [1] In that case the judge stated that if the magistrate felt his powers are inadequate he should transfer the case to the sessions court. The learned magistrate in that case exercised the powers of a president and sentenced the accused to 3 years imprisonment without so transferring the case to the sessions court. Section 87(2) of the Courts Ordinance however permits a magistrate to sentence an accused beyond his normal term. It reads:—

"Notwithstanding the provisions of sub-section (1), where a first class magistrate has convicted any person and it appears that, by reason of any previous conviction or of his antecedents, a punishment in excess of that prescribed by sub-section (1) of this section should be awarded then such first class magistrate may award the full punishment authorised by law for the offence of which such person has been convicted and shall record his reason for so doing."

This sentence is subject to confirmation by the High Court.

Clearly the magistrate should not have hesitated to invoke section 87(2) in this case. He stated in his grounds of judgment:—

"Having regard to all the circumstances of the offence, and the accused, and the circumstances of his previous convictions I am of the view that the sentence of one year's imprisonment in the present case though not wrong, is rather inadequate. The appropriate sentence would have been a sentence of three years' imprisonment, which I had desisted from imposing under the provisions of section 87(2) of the Courts Ordinance, 1948, solely because of the judgment of Hashim J. in *Hitam* v. *Public Prosecutor.*"

I am of the opinion that the magistrate has misconstrued that particular case. I am therefore going to exercise the power which he clearly had under section 87(2). The accused had 22 previous convictions from 1933, eighteen of which are for theft, and he had been in jail practically the whole of his adult life and had shown little regard for property rights of his fellow men.

Accordingly I substitute the order of 12 months' imprisonment to one of 3 years' imprisonment.

Sentence enhanced.

SAFETY INSURANCE CO. LTD. v. HUA SENG ELECTRIC CO.

[A.C.J. (Ali J.) February 12, 1968]

[Johore Bahru — Civil Appeal No. 3 of 1966]

Practice and Procedure — Judgment in default of appearance at trial — Setting aside — Reason for absence not shown — Party not entitled to have it set aside — Subordinate Courts Rules, 1950, O. 19 r. 3(3) — Road Traffic Ordinance, 1958, s. 80(1).

The respondents brought this action in a magistrate's court to enforce a judgment they had obtained in an earlier action against the appellant insurance company by virtue of a right claimed under section 80(1) of the Road Traffic Ordinance, 1958. As the appellant failed to appear at the trial the respondents obtained a judgment in default of appearance. The appellant subsequently applied to have the default judgment set aside but the magistrate who heard the application dismissed it on the ground that the appellant failed to satisfy him that there was good reason for the absence at the trial. The appellant appealed against the decision of the magistrate.

Held, dismissing the appeal: (1) before a judgment in default of appearance at trial could be set aside the party in default must show: (i) there was a good defence to the action and (ii) as required by O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, there was good reason for such absence. In view of the express provisions of this rule it was not right to apply the practice adopted by the High Court in a similar matter;

(2) on the facts of this case the appellant failed to show good reason for the absence at the trial.

MAGISTRATE'S CIVIL APPEAL.

N. Ramachandran for the appellant.

Kamil Suhaimi for the respondent.

Ali J.: The appellant was the defendant in Johore Bahru Magistrates' Court Civil Action No. 601 of 1965 brought to enforce a judgment obtained by the respondent in another action. The respondent had brought this action against the appellant by virtue of a right claimed under section 80(1) of the Road Traffic Ordinance, 1958. By reason of his failure to appear personally or by advocate on the date fixed for the trial of the action judgment in default of appearance was entered against the appellant on the 24th March, 1966. A little more than a month after this the appellant filed an application to set aside the default judgment. In support of this application there was filed an affidavit by the appellant's solicitor, Mr. N. Ramachandran, who in terms stated that he received instructions from the appellant only on the 23rd March, *i.e.* one day before the date of the trial. It seems clear from this affidavit that the only ground relied upon by the appellant in support of the application to set aside the default judgment was that there was a good defence to the action. The learned magistrate, nevertheless refused the application as the appellant failed to satisfy him that there was good reason for his absence on the 24th of March. At the hearing of this appeal it was conceded by the respondent's counsel that the statement of defence filed by the appellant in the court below *prima facie* shows good defence to the action. In the event the only question requiring determination was whether in the particular circumstances of this case the learned magistrate was right in refusing to set aside the default judgment.

It is abundantly clear from the affidavit of the appellant's solicitor that the appellant made a tangible attempt to defend the action only on the 23rd March, 1966, *i.e.* one day before the date fixed for the hearing of the action. No explanation whatsoever was given for their inability to make arrangements to defend the action earlier. That such an explanation is required is clear from O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, which provides as follows:—

> "Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the court shall think fit. Notice of such application shall be given to the opposite party."

In his judgment the learned magistrate referred to this rule and correctly stated that in terms thereof the appellant had to satisfy him not only that there was a good defence to the action but also there was good reason for the absence. As far as the trial magistrate was concerned, he was satisfied that the appellant appeared to have a good defence although the defence statement was filed out of time. But he was not satisfied that the appellant had shown good reason for his absence. On this ground he dismissed the application to set aside the default judgment. In view of the express provisions of the rule already stated I do not think it right to apply the rule of practice adopted by the High Court in a similar matter. In this particular case the appellant is a public limited company whose affairs are managed by responsible officials who knew or ought to have known from the terms of the summons served on them the consequences of a failure to appear and defend the action within the time indicated. If they had a reasonable excuse for such a failure the least they could have done was to swear an affidavit stating the reasons why they could not personally attend court or instruct counsel in time to enable appearance to be made on their behalf. In the event it was not at all surprising for the learned magistrate to reach the conclusion that the application to set aside the default judgment was devoid of merit. For my part I need only say that the appellants have only themselves to blame if they fail in this appeal. It must not be taken too much for granted that because a party has a good defence to an action he can deliberately ignore the rule governing appearance. A rule is designed to regulate the procedure in court and should be complied with. In this particular case the rule itself provides for a relaxation on certain conditions being fulfilled to the satisfaction of the magistrate. The appellant had clearly failed to fulfil one of these conditions and I, therefore, considered that this was not a proper case in which I should interfere.

Accordingly the appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *N. Ramachandran; Harban Singh & Kamil.*

LO FAT THJAN & ORS. v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) February 19, 1968]

[K.L.—Federal Court Criminal Reference No. X.2 of 1967]

Criminal Law and Procedure — Adducing fresh evidence — Report of government chemist insufficient — Whether legally permissible for High Court to call chemist to give oral evidence to supplement report — Criminal Procedure Code (S.S. Cap. 21).

Evidence — Additional evidence — Admission of, on appeal — When allowed.

Dangerous Drugs — Charge of importing — Chemist's report — Whether report can be supplemented by oral evidence — Dangerous Drugs Ordinance, 1952, s. 4(1).

On a reference to the Federal Court on a certificate of a judge of the High Court under section 66 of the Courts of Judicature Act, 1964 as to whether in an appeal to the High Court against a conviction by a